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17 UNITED STATES DISTRICT COURT
18 CENTRAL DISTRICT OF CALIFORNIA

19 VERNON UNSWORTH,
20 Plaintiff,
21
22 v.
23 ELON MUSK,
24 Defendant.
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Case No. 2:18-cv-08048-SVW (JCx)
Judge: Hon. Stephen V. Wilson

**PLAINTIFF VERNON UNSWORTH'S
RESPONSE TO DEFENDANT'S
MOTION IN LIMINE NO. 3 TO
EXCLUDE EVIDENCE OF
PURPORTED PRESS LEAKS**

Pretrial Conference: Nov. 25, 2019
Hearing Date: Nov. 25, 2019
Time: 3:00 p.m.
Courtroom: 10A

INTRODUCTION AND FACTUAL BACKGROUND

Defendant Elon Musk's motion to exclude his now-admitted campaign to plant stories – via written instructions to his felonious investigator – in the UK and Australian press is frivolous as to its substance, rife with misrepresentative omissions, and disturbing in its defamatory suggestions regarding Plaintiff Vernon Unsworth's UK counsel, again highlighting the desperation of Musk in his efforts to create any defense to his conduct in this case.

Musk takes the position that this Court should exclude evidence of Musk's staged and malicious campaign to plant false stories in the press via that same investigator because the investigator reported to Musk that he was attempting to surreptitiously obtain privileged information about Unsworth's UK counsel and legal strategy. This specious contention is based ***on the entirely false, malicious, and baseless suggestion that somehow Unsworth's UK attorneys were in cahoots with the investigator to set up Musk by having the investigator provide Musk with false and defamatory information about Unsworth from his very first communication to Musk on and after July 15, 2018.***¹ In an act of shameless hypocrisy, Musk relies heavily on Howard's false, unverified, and vague information to defend this case on the issue of actual malice, while seeking to prohibit admission of Howard's efforts to plant false and defamatory accusations against Unsworth at the specific request of Musk. With a straight face and an abusive intent, Musk asserts an utterly nonsensical position that Unsworth's UK counsel and

¹ Unsworth has recently learned that this false, malicious, and baseless accusation was made by Musk's lead attorney, Alex Spiro, *in a fraud report filed with a police agency in the UK on September 25, 2019*. Unsworth will be prepared to provide the Court with an in camera review of the UK police report filed by Spiro at the hearing on this motion or at the pre-trial hearing. To accuse Unsworth's UK counsel of fraud without a scintilla of supporting evidence, and then submit the false report in this proceeding as a defense trial exhibit, raises serious legal and ethical questions justifying *sua sponte* sanctions against Musk and his law firm, Quinn Emanuel, and revocation of Spiro's pro hac vice privileges.

1 the investigator conspired to create Musk's libel while also creating his defense to
2 the libel. Musk's contention crosses the line of proper conduct before this Court and
3 amounts to an obstruction of justice by Musk and his involved attorneys.

4 The complete facts regarding Musk's overt instruction and intention to have
5 published false and misleading accusations against Unsworth were fully addressed
6 in Unsworth's Statement of Genuine Disputes in Opposition to Defendant's Motion
7 for Summary Judgment, Statements of Fact 55-57 [Dkt. 76 at pp. 43-48].
8 Specifically:

9 1. Contemporaneously with Musk's August 28, 2018, tweet stating, *inter*
10 *alia*, "don't you think it's strange he hasn't sued me" in response to a reporter stating
11 he had called Unsworth a "pedo," Musk's front man Jared Birchall (under the
12 fictional identity of Jim Brickhouse) delivered an e-mail to the investigator, James
13 Howard, stating in material part:

14 We would like you to immediately move forward with 'leaking' this
15 information to the UK press. Obviously must be done very carefully.

16 The line of thinking at this point is as follows:

- 17 • Thailand is the world capital of pedophilia
- 18 • This man has frequented Thailand since the 80's – eventually leading
19 to his divorce to his wife in the UK.
- 20 • While the guise of cave exploration is creative, there are amazing and
21 extensive caving systems in many places throughout the world – not
22 just in Thailand. Even the most ardent supporter of Thai food doesn't
23 eat Thai food every day.
- 24 • He eventually woman 30 years his minor [sic] – who he met while she
25 was a teenager
- 26 • He had been going to Thailand for decades before marrying her. She
27 wasn't the first girl he met – and definitely not the first teenager he
28 interacted with.

1 Share the facts and as you said, that should be enough for a story.

2 But we'd like to make this happen immediately.

3 (Wilson Decl. [Dkt. 79] Ex. 33 at p. 569).

4 2. Contemporaneously, Birchall was texting with Howard confirming his
5 authority to plant these accusations in the press and stating it should expand from
6 the UK to include Australia, with the two of them stating, e.g.:

- 7 • "...Priority is to divert the story away from the principal and let the UK
8 tabloids develop there [sic] story." [Howard]
- 9 • "Would be ideal to have more than one publisher receive the info."
10 [Birchall]
- 11 • "100%. Plan is to reach out indirectly to 3/4 different newspapers &
12 print & online. ..." [Howard]
- 13 • "So nothing out yet has your info?" [Birchall]
- 14 • "Daily Mail are now interested through Mick Smith. That's [sic] the
15 paper that will have the biggest impact" [Howard]
- 16 • "Ok, good ... Please let me know when you have word of a story with
17 your narrative being published. One other thought, maybe we consider
18 the Australian press as well. ..." [Birchall]

19 (Wilson Decl. [Dkt. 78] at Ex. 25).

20 3. Birchall then confirmed in his deposition that Musk authorized this
21 press campaign and that he was likely involved in framing the information set out in
22 the instructive e-mail to Howard, testifying in material part as follows:

- 23 • The "we" in the above August 28, 2019, e-mail instructing Howard to
24 plant this information in the UK press is Birchall and Musk
- 25 • Birchall testified "Yeah" in response to being asked whether "you
26 wanted the story to be published, and Mr. Musk wanted it to be
27 published too. True?"
- 28 • Birchall stated "I believe so, yes" in response to being asked whether

- 1 “Mr. Musk wanted this information leaked to the UK press”
- 2 • Birchall stated “Yes” in response to being asked “you said ‘We agree
- 3 to it,’ and Musk said that ‘I agree to it being leaked,’ right?”
- 4 • Birchall testified “Yes” in response to being asked that “you are saying
- 5 that you and Mr. Musk did want these leaks to happen immediately,
- 6 true?”
- 7 • Birchall testified the story was purposed to “have people question the
- 8 motive [of Unsworth] for being in Thailand” and that “pedophilia”
- 9 “would be among the things that people would question,” and that this
- 10 was done because “we needed to somehow balance ... a clear
- 11 imbalance in what was in the media.”
- 12 • Birchall testified “Yes” in response to being asked whether the “fact of
- 13 the matter is you and Elon Musk wanted this information contained in
- 14 Exhibit 66 and forwarded to the Sun as reflected on Exhibit 67, you and
- 15 Mr. Musk wanted this information to be public; to be written about by
- 16 the media, true?”
- 17 • Birchall testified that it was “Likely” that “Mr. Musk would have
- 18 known that you were suggesting the avenue of also publishing in
- 19 Australia,” too.

20 (Wilson Decl. [Dkt. 77] Ex. 2 (Birchall Depo. 109:18-110:6, 111:18-24, 114:23-

21 115:21, 119:1-120:25, 125:13-126:3, 129:10-13, 273:4-24)).

22 The evidence Musk wishes to exclude is relevant and probative on the issues

23 of (1) Musk’s state of mind, (2) Musk’s intention and desire that BuzzFeed publish

24 his August 30, 2019, e-mail accusing Unsworth of being a child rapist and taking a

25 12-year-old child bride, (3) punitive damages, and (4) Musk’s subjective intent with

26 respect to the factual nature and defamatory meaning of his tweets in this case,

27 including without limitation the August 28 “don’t think you it’s strange he hasn’t

28 sued me yet” tweet which was published contemporaneously with these press leak

1 efforts.

2 Musk's motion is nothing more than an objection to relevant, probative, and
3 truthful evidence on the grounds that Musk knows the evidence is damning and
4 incriminating. This is exactly the type of information the jury must consider in its
5 search for the truth. "Relevant evidence is inherently prejudicial; but it is only unfair
6 prejudice, substantially outweighing probative value, which permits exclusion of
7 relevant matter under Rule 403." *Positive Ions, Inc. v. Ion Media Networks, Inc.*,
8 2007 WL 9701734, at *1 (citing *U.S. v. Hankey*, 203 F.3d 1160, 1172 (9th Cir.
9 2000)). Musk's motion and objection must be overruled.

10 **ARGUMENT**

11 The legal arguments raised by Musk in his misguided effort to exclude this
12 evidence must be viewed in the context of the inequities inherent in Musk's request.

13 **I. MUSK RELIES ON HOWARD'S REPORTS AS HIS DEFENSE.**

14 Musk improperly seeks to selectively use portions of his investigations of
15 Unsworth as both swords and shields. First, Musk relied at summary judgment
16 almost exclusively on the vague, unsubstantiated, and unverified communications
17 between his investigator, Howard, and his right-hand-man Birchall, to (1) knowingly
18 and falsely paint Unsworth as all those things Musk has accused him of being and
19 (2) suggest that he was not reckless in accusing Unsworth of being a child rapist and
20 having a child bride, among other false accusations. To assert this defense at trial,
21 Musk will by necessity have to rely on Howard's reports and communications.
22 Second, Musk has shielded from discovery the existence, purpose, scope, and facts
23 uncovered during a second investigation by a second investigator on the purported
24 basis of work product protection. (*See generally* Joint Stipulation on Plaintiff's
25 Motion to Compel [Dkt. 84]). Musk's ongoing attempts to selectively use portions
26 of his investigations as both swords and shields are inequitable and should not be
27 endorsed.

28

1 Indeed, at bottom, Musk is asking this Court to permit his use of Howard's
 2 reports and communications to support his defenses in this case and then exclude
 3 certain portions of those communications that clearly demonstrate Musk's personal
 4 involvement in the investigation and the scope of his unwarranted and unfounded
 5 attacks on Unsworth. Such an inequitable contention could only be allowed in the
 6 fictional "Court of Musk" – it has no place in a United States District Court.

7
 8 **II. EVIDENCE REGARDING MUSK'S EFFORTS TO PLANT**
 9 **STORIES IN THE PRESS REGARDING UNSWORTH IS**
 10 **RELEVANT AND PROBATIVE OF VARIOUS ISSUES IN THIS**
 11 **CASE.**

12 Not surprisingly, Musk intentionally misstates the evidence before the Court.
 13 The issue is not whether Unsworth seeks to admit "speculative evidence at trial"
 14 regarding "[w]hether Mr. Howard leaked information about Mr. Unsworth..." (Mot.
 15 at 3). The issue is not whether such "'leaks' were real" or whether "any stories were
 16 ever published." (Mot. at 2). Rather, the issue is whether Unsworth can admit into
 17 the record the *undisputed* evidence that Musk and Birchall specifically instructed
 18 Howard to plant such stories in the press, their knowledge and expectation that he
 19 was in fact doing so, as outlined herein, and the e-mail itself as being evidence of
 20 Musk's knowledge and state of mind. It is clear that this evidence is relevant:
 21 "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable
 22 than it would be without the evidence; and (b) the fact is of consequence in
 23 determining the action." FRE 401.

24 **a. Musk's Malicious Public Relations Campaign Is Relevant to**
 25 **Musk's State of Mind Regarding Truth or Falsity.**

26 As the Court acknowledged at the summary judgment hearing of this matter,
 27 while Unsworth is a private figure for the purpose of assessing liability in this matter,
 28 actual malice and common law malice remain at issue in this case. Musk's press
 campaign is highly probative of Musk's malice and his knowing disregard of truth
 or falsity.

1 In Birchall's August 28, 2018, e-mail to Howard instructing him "to
 2 immediately move forward with 'leaking' this information to the UK press," the
 3 substance of which Birchall testified Musk was likely involved in creating, Birchall
 4 and Musk *did not accuse Unsworth of being a child rapist or having a child bride*
 5 *despite the fact that the accusations would have been coming from an anonymous*
 6 *third-party who Musk and Birchall had taken great pains to avoid being tied to,*
 7 *including by use of aliases and avoiding any written contact with Musk.* Instead,
 8 Birchall suggested Unsworth is a pedophile by stating some generalities such as,
 9 e.g., "Thailand is the world capital of pedophilia," while also stating some specifics
 10 such as, e.g., "He eventually [married] a woman 30 years his minor – whom he met
 11 while she was a teenager." (Wilson Decl. [Dkt. 79] at Ex. 33).

12 In other words, despite having the relative comfort of total anonymity in
 13 making these accusations, Musk and Birchall stated only that Unsworth had married
 14 a younger woman that he had met while she was a teenager, but not that Unsworth
 15 is a "child rapist" who moved to Chiang Rai "for a child bride who was about 12
 16 years old at the time," as Musk published to BuzzFeed just two days later in claimed
 17 reliance on the investigator's information. (Wilson Decl. [Dkt. 78] at Ex. 19).

18 These discrepancies are material and significant. They are highly probative as
 19 to Musk's knowledge that his accusations were false. Indeed, the substance of the
 20 August 28, 2018, e-mail instructing Howard to conduct these press "leaks" is highly
 21 relevant to Musk's accusations against Unsworth. The sharp discrepancies between
 22 the investigative notes as to the leaks and Musk's statements to BuzzFeed support a
 23 jury finding that Musk's accusations were knowing and outright fabrications.

24 **b. Musk's Malicious Public Relations Campaign Is Relevant to**
 25 **Musk's Alleged Subjective Intent in Publishing the Tweets.**

26 Musk asserted at summary judgment, and apparently intends to so claim again
 27 at trial, that he never intended to describe Unsworth as a pedophile on Twitter but
 28 only intended to convey that Unsworth struck him as a "creepy old man" in

1 appearance and manner. He further asserted on motion to dismiss and apparently
 2 intends to argue at trial that he was not conveying factual information in tweeting
 3 his accusation of pedophilia against Unsworth. The August 28, 2018, e-mail at issue
 4 in this motion paints a much different picture.

5 The August 28, 2018, e-mail and Birchall's testimony regarding its purpose
 6 plainly reveals Musk's testimony that he did not intend to call Unsworth a pedophile
 7 on Twitter to be frivolous and potentially perjurious. Indeed, for instance, Musk was
 8 tweeted at by a reporter stating, in part, "your dedication to facts and truth would
 9 have been wonderful if applied to **that time when you called someone a pedo.**"
 10 (Wilson Decl. [Dkt. 78] at Ex. 18) (Emphasis added). Musk responded at 9:41 a.m.
 11 on August 28, 2018, stating, in part, "You don't think it's strange he hasn't sued
 12 me?" (*Id.*).

13 It was just seven minutes later, at 9:48 a.m. on August 28, 2018, that Birchall
 14 sent the e-mail instructing Howard to plant stories in the press suggesting that
 15 Unsworth is a pedophile. (Wilson Decl. [Dkt. 79] at Ex. 33). Birchall affirmatively
 16 testified that the information being "leaked" was purposed "to have people question
 17 the motive [of Unsworth] for being in Thailand," and that pedophilia "would be
 18 among the things that people would question." (Wilson Decl. [Dkt. 77] at Ex. 2).
 19 The timing and content of the e-mail to Howard is highly probative of Musk's
 20 claimed subjective intent that his Twitter postings were anything other than factual
 21 assertions of pedophilia.

22 **c. Musk's Malicious Public Relations Campaign is Relevant to**
 23 **Musk's Liability for Republications of His Accusations.**

24 Musk asserts that his instruction to Howard to plant false stories in the press
 25 regarding Unsworth "does not bear on whether Mr. Musk intended to [sic] his
 26 communications with BuzzFeed to be 'off the record,'" (Mot. at 2), but the jury is
 27 entitled to find otherwise. The leak campaign is relevant to this litigation and highly
 28 probative of Musk's intent – and the lengths to which he was willing to go – to ensure

1 that the media published false and defamatory accusations against Unsworth in order
2 to “level the playing field.” This is especially so in light of Birchall’s affirmative
3 testimony confirming that Musk “wanted the story published” in order to obtain
4 “unflattering” articles regarding Unsworth which would “balance ... a clear
5 imbalance in what was in the media.” (Wilson Decl. [Dkt. 77] at Ex. 2).

6 The legal standard on republication is whether “(b) the repetition was
7 authorized or intended by the original defamer, or (c) the repetition was reasonably
8 to be expected.” Restatement (Second) of Torts § 576. This evidence clearly goes
9 to this standard, as it is undisputed that Musk intended that the media republish his
10 false statements conveying Unsworth to be a child rapist. It was, according to
11 Birchall, his express intention that such stories “happen immediately” beginning
12 August 28, 2018, and the temporal connection to his August 30, 2018, e-mail to
13 BuzzFeed cannot be denied. He wanted this information in the public realm, and he
14 achieved that by e-mailing BuzzFeed when this initial effort via Howard did not pay
15 off quickly enough.

16 The evidence is clear that at the very same time Musk was emailing BuzzFeed
17 that Unsworth was a child rapist, he was also actively attempting to have accusations
18 of sexual misconduct published in the UK through the machinations of a convicted
19 felon “investigator.” The timing makes it clear — or is at least highly probative of
20 the fact — that the two “leaks” to the media were related. Indeed, that there is no
21 evidence that Howard was successful in getting the information actually published
22 in the UK media makes the information more relevant, not less relevant — a jury will
23 be entitled to draw the reasonable inference from this evidence that Howard’s failure
24 sparked Musk to take matters into his own hands and fire off his emails to BuzzFeed
25 to get his “unflattering” accusations published anonymously to “correct” the
26 “imbalance” in the media. Who reasonably would be expected to not publish
27 salacious and heinous criminal accusations leveled against the cave rescuer who was
28 the subject of the pedo guy controversy when the source is Elon Musk? No one. The

1 media would investigate (as BuzzFeed did) and publish the entire truth (as BuzzFeed
2 did).

3 **d. Musk’s Malicious Public Relations Campaign Is Relevant to**
4 **Punitive Damages.**

5 Musk’s attempt to plant stories in the press via Howard is also relevant and
6 probative on the issue of punitive damages as it is evidence of actual malice and
7 common law malice. “The requisite intent to support punitive damages is malice,
8 and it may be proved either expressly (by direct evidence probative on the existence
9 of hatred or ill will) or by implication (by indirect evidence from which the jury may
10 draw inferences).” *Kaffaga v. Estate of Steinbeck*, 938 F.3d 1006, 1016 (9th Cir.
11 2019) (internal quotations and citations omitted).

12 There can be no reasonable dispute that Musk’s efforts to orchestrate a press
13 campaign to assassinate Unsworth’s character is probative evidence of Musk’s
14 common law malice, directly and indirectly.

15 **III. EVIDENCE REGARDING MUSK’S EFFORTS TO PLANT**
16 **STORIES IN THE PRESS CANNOT BE EXCLUDED UNDER FRE**
17 **403.**

18 Musk’s assertion that the probative value of this evidence – addressed above
19 – is outweighed by the danger of unfair prejudice is unavailing. The standard is not
20 whether this highly relevant evidence is “unnecessarily prejudicial to Mr. Musk’s
21 case,” as suggested by Musk. (Mot. at 2). “Relevant evidence is inherently
22 prejudicial; but it is only unfair prejudice, *substantially outweighing probative value*,
23 which permits exclusion of relevant matter under Rule 403.” *Positive Ions, Inc.*,
24 2007 WL 9701734, at *1 (citing *U.S. v. Hankey*, 203 F.3d 1160, 1172 (9th Cir.
25 2000)) (emphasis added). Indeed, “[r]ule 403’s ‘major function is limited to
26 excluding matter of *scant or cumulative probative force, dragged in by the heels for*
27 *the sake of its prejudicial effect.*”” *Id.* (citing *Hankey*, 203 F.3d at 1172) (emphasis
28 added).

1 The probative value of this evidence is many, varied, and clear. The fact that
2 it is prejudicial to Musk's case is not a factor in the analysis; it must be *unfairly*
3 prejudicial and that unfair prejudice must substantially outweigh the probative value.
4 Musk cannot submit to this Court any law suggesting that a defendant's conduct
5 against the plaintiff is irrelevant and unfairly prejudicial – whether it be prior conduct
6 or contemporaneous conduct as is the case here – under these or other circumstances.

7 Musk's related assertion that admitting this evidence will result in a "trial
8 within a trial" is based on his self-created, false and unsupported accusation against
9 Unsworth's UK counsel first asserted by the filing of the UK police report by Spiro.
10 The creation of this issue is an effort to perpetrate a fraud upon this Court and the
11 parties to that fraud are Musk and his attorney. That dispute may well be decided on
12 another day in another forum, but it has no relevance to this case and its assertion by
13 Musk is sanctionable.

14 *First*, the "trial within a trial" position makes no sense on its face. Musk
15 asserts that "both parties would have to present evidence regarding an entirely
16 different set of (non-existent) news stories." (Mot. at 4). Musk's suggestion is
17 dishonest and disingenuous when he states that admitting this evidence "will, by
18 necessity, require Defendant to explore communications between Mr. Howard and
19 Mr. Unsworth's attorneys," which "would include any evidence regarding *their*
20 *knowledge of Mr. Howard's purported leaks and other activities.*" (Mot. at 4-5)
21 (emphasis added). Musk knows that there is absolutely, unequivocally, no such
22 evidence. He sought communications, if any, between the investigator and
23 Unsworth's counsel by subpoena. He received no such documents or
24 communications because they do not exist. Non-existent evidence and a fictional
25 accusation created by Musk and his counsel do not create a trial within a trial. They
26 only create a need for severe sanctions to be imposed on Musk and his counsel.

27 *Second*, Musk's continued casting of defamatory aspersions on Unsworth is
28 contradicted by all of the evidence. Howard reached out to Musk on July 15

1 suggesting he had dirt on Unsworth. He then engaged in a months' long campaign
 2 to invade the privacy of Unsworth and reported back false and defamatory innuendo
 3 and false information. Moreover, the evidence in this case is unequivocal that Musk
 4 and Birchall knew and encouraged Howard to spy on Unsworth and obtain
 5 information regarding his legal representation and strategy. *See, e.g.*, Wilson Decl.
 6 [Dkt. 78] at Ex. 25 (text messages between Howard and Birchall with Birchall
 7 asking, e.g., "Confirmed that he has been retained by Unsworth?" and Howard
 8 responding "No Bcut I can find out Later this morning I know another partner at the
 9 law firm Can make a social call & make a soft enquiry" and "I'm met with a partner
 10 of Howard Kennedy last night who confirmed that Unsworth has been to the London
 11 office for meetings..."); *Id.* at Ex. 23 ("This will be to establish how far along the
 12 legal route he has gone and what the strategy is.").

13 FRE 403 is not a basis to exclude evidence of Musk's authorization of and
 14 instruction to Howard to plant false information in the press regarding Unsworth.

15 **IV. EVIDENCE REGARDING MUSK'S EFFORTS TO PLANT**
 16 **STORIES IN THE PRESS REGARDING UNSWORTH DOES NOT**
 17 **CONSTITUTE CHARACTER EVIDENCE.**

18 Evidence regarding Musk orchestrating a press campaign against Unsworth is
 19 not character evidence at all. It is not submitted to prove any character trait of
 20 Musk's, and Musk's six-line argument in this regard does not even attempt to
 21 identify what trait this evidence is establishing. Indeed, as outlined herein regarding
 22 the various relevant purposes for which this evidence is being submitted, there are a
 23 litany of non-character purposes to admit this evidence.

24 First, this evidence is not evidence of an "*other act*" identified by FRE
 25 404(b)(1). (Emphasis added). This is the very same act constituting a single
 26 transaction against the very same party. This is not a case where the defendant may
 27 have on a separate occasion committed a similar bad act against another individual.
 28 Musk's actions in orchestrating this press campaign form part and parcel of the

1 relevant factual circumstances of this very case; not another case. It is one single
2 investigation against one single person, Unsworth.

3 Even if this evidence did constitute character evidence, it would be admissible
4 under FRE 404(b)(2) because it is being submitted for various non-character
5 purposes. “Evidence of a crime, wrong, or other act ... may be admissible for
6 another purpose, such as proving motive, opportunity, intent, preparation, plan,
7 knowledge, identity, absence of mistake, or lack of accident.” FRE 401(b)(1)-(2);
8 *cf. McFee v. State*, 511 So.2d 130, 136 (Miss. 1987) (“Proof of another crime is
9 admissible where the offense charged and that offered to be proved are so connected
10 as to constitute one transaction, where it is necessary to identify the defendant, where
11 it is material to prove motive and there is an apparent relation or connection between
12 the act proposed to be proved and that charged ... In short, evidence of a defendant’s
13 other crimes is admissible, where it is integrally related in time, place, and fact,’ to
14 that for which he stands trial ...”). To the extent evidence of Musk’s
15 contemporaneous actions against Unsworth can somehow be considered character
16 evidence, it is admissible to prove motive, intent, and knowledge, and because it is
17 simply part of the factual circumstances of this particular case. Musk’s malicious
18 motive and intent in publishing his false accusations against Unsworth; his motive
19 and intent for e-mailing BuzzFeed to ensure after Howard had failed that his false
20 accusations would be published; his intent in publishing his August 28 tweets; and
21 his intent and knowledge that his e-mails to BuzzFeed and his tweets were factual
22 and defamatory in nature.

23 To elaborate further on one additional and permissible non-character purpose
24 of this evidence, even if Musk’s efforts to assassinate Unsworth’s character through
25 a campaign other than his Twitter posts and BuzzFeed e-mail constituted character
26 evidence submitted for the purpose of proving character, it would still be admissible
27 on punitive damages. *See, e.g., O’Connor v. Boeing North American, Inc.*, 2005 WL
28 6035256, at *30 n. 34 (C.D. Cal., Aug. 9, 2005) (rejecting assertion of character of

1 evidence and holding that “[t]he California Supreme Court has held that evidence
2 regarding a defendant’s conduct which is related to the cause of action are admissible
3 to establish punitive damages pursuant to § 3294” and stating “if the ‘conduct in
4 question replicates prior transgressions, it would be properly admitted to determine
5 punitive damages.’”) (citing *Potter v. Fire Stone Tire & Rubber*, 7 Cal. 4th 965 (1993)
6 and *Johnson v. Ford Motor Co.*, 35 Cal. 4th 1191, 1203 (2005) (“Similar conduct by
7 a defendant may be potentially relevant to the reprehensibility of the conduct, and
8 hence to the permissible size of punitive damages.”)).

9 **CONCLUSION**

10 For the foregoing reasons, Unsworth respectfully requests that the Court deny
11 Musk’s Motion in Limine to exclude evidence of Musk’s instruction to plant stories
12 in the UK and Australian press regarding Unsworth. Unsworth also requests that the
13 Court consider severe sanctions against Musk and his counsel.

14
15 Dated: November 11, 2019

L. LIN WOOD, P.C.

By: /s/L. Lin Wood

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Attorneys for Plaintiff Vernon Unsworth

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